HENRY A. ALKER

IBLA 80-523 Decided July 28, 1980

Appeal from a decision of the Utah State Office, Bureau of Land Management, dismissing protest against issuance of oil and gas lease U-44320.

Reversed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents – Oil and Gas Leases: Applications: Drawings

   Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether the agent signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

2. Rules of Practice: Appeals: Failure to Appeal – Rules of Practice: Appeals: Notice of Appeal

   Where following dismissal of a protest, a protestant files a supplemental protest and request for reconsideration, but asks that should such pleading be rejected it be considered in the alternative as a notice of appeal, protestant has complied with the

provisions of 43 CFR 4.411 if such pleading is filed with BLM within 30 days after being served with BLM's dismissal of the protest.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico, for appellant; William M. King, Esq., Austin, Texas, for the adverse party.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Henry A. Alker appeals the decision of the Utah State Office, Bureau of Land Management (BLM), dated February 20, 1980, dismissing his protest against the issuance of oil and gas lease U-44320 to Ronald E. Smith.

In the October 1979 drawing of simultaneous oil and gas lease offers, the offer of Ronald E. Smith was drawn with first priority for parcel UT 19. This parcel occupies all of secs. 6, 7, and 18, and parts of secs. 8 and 19, T. 21 S., R. 7 E., Salt Lake meridian, Emery County, Utah. As the winning drawing entry card (DEC) bore the facsimile signature of Smith, BLM, by letter of December 3, 1979, required Smith to submit a copy of any service agreement or other collateral agreements, including brokerage arrangements, between Smith and any other party. BLM further requested information as to who applied the facsimile signature on Smith's DEC. Smith complied with BLM's request on December 28 enclosing a copy of a service contract which he had entered with Leland Capital Corporation. Smith also enclosed the originals of two statements, one of which indicated that Smith's facsimile signature had been affixed by Leland Capital.

In the meanwhile, Henry A. Alker filed with BLM on December 7, 1979, a protest against the issuance of lease U-44320 to Smith. In his protest, Alker suggested that the service contract used by Smith and Leland Capital gave Leland Capital a security interest in the offer and further suggested that Leland Capital may act as broker for the sale of a lease and take an interest in such sale.

By decision of February 20, 1980, the Utah State Office dismissed Alker's protest stating that the service contract and affidavits of Smith and Leland Capital provided no evidence that Leland Capital was a party in interest in Smith's offer. This decision was followed on March 17, 1980, by BLM's receipt of a Supplemental Protest and Request for Reconsideration submitted by R. Hugo C. Cotter, Esq., appearing as counsel for Alker. Therein, Cotter maintained that the DEC of Smith should be rejected because Smith's offer was not accompanied by the separate statements of Smith and Leland Capital required by 43 CFR 3102.6-1.

On March 29, 1980, the State Office wrote to Cotter explaining that his Supplemental Protest and Request for Reconsideration of March 14, 1980 (received by BLM on March 17, 1980), was being considered an appeal from the dismissal of Alker's protest. Cotter thereupon filed a statement of reasons with this Board on April 28, 1980, reiterating his argument based on 43 CFR 3102.6-1. This statement also included arguments calling for the summary rejection of offers submitted by Leland Capital based upon its conduct in Lee S. Bielski, 39 IBLA 211 (1979). In response to these charges, Smith filed an answer as an adverse party.

[1] While we reject the notion that all offers submitted by Leland Capital be summarily rejected, we reverse BLM's decision of February 20, 1980, and hold that the service contract existing between Smith and Leland Capital conferred upon Leland Capital the status of an agent of Smith. As a result, both Smith and Leland Capital were required to accompany Smith's DEC with the statements set forth in 43 CFR 3102.6-1.

Regulation 43 CFR 3102.6-1 states in part:

> (2) If the offer is signed by an attorney in fact or agent, it shall be accompanied by separate statements over the signatures of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued, including royalty interest or interest in any operating agreement under the lease, giving full details of the agreement or understanding if it is a verbal one. The statement must be accompanied by a copy of any such written agreement or understanding. If such an agreement or understanding exists, the statement of the attorney-in-fact or agent should set forth the citizenship of the attorney-in-fact or agent or other person and whether his direct and indirect interests in oil and gas leases, applications, and offers including options for such leases or interests therein exceed 246,080 acres in any one State, of which no more than 200,000 acres may be held under option, or exceeds the permissible acreage in Alaska as set forth in § 3101.1-5. The statement by the principal (offeror) may be filed within 15 days after the filing of the offer.

No statement by either Smith or Leland Capital was filed with the offer or within 15 days thereafter.

Our holding that an agency relationship exists between Smith and Leland Capital is based upon an examination of the service contract at

issue and prior holdings of this Board. In D. E. Pack (On Reconsideration), 38 IBLA 23 (1978), 1/ the agency relationship was discussed in the syllabus:

> Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether [the agent] signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

Therein, we found that a filing service had discretionary authority to act on behalf of an offeror where an agreement existed between these parties by which the filing service for a stipulated fee selected parcels of superior value from the monthly lists of available BLM lands, prepared DEC's for these parcels by inserting the name of the offeror, his facsimile signature, parcel number, and date and then filed these DEC's in the proper BLM offices.

Examining the service contract between Leland Capital and Smith, we note that for the sum of $6,000 Smith retained Leland Capital "to provide its advisory services" in filing 144 DEC's "pursuant to LCC's Federal Oil Land Acquisition Program." Leland Capital agreed to file on parcels which had a potential of $10,000 or more. Smith agreed to pay to Leland Capital, against invoice, all costs of the first year's advance rental. The service contract at issue here, while not identical to that discussed in Pack, supra, is sufficiently similar to support our requiring the filing of statements pursuant to 43 CFR 3102.6-1 with the Smith offer.

1/ Since issuance of this decision on November 9, 1978, the District Court for the District of Utah, Central Division, has ruled that our holding therein may be applied prospectively only. The Secretary and his designees were enjoined from applying the Pack holding to lease offers filed prior to November 9, 1978. The filings by Smith and Alker were made on October 22, 1979. Runnells v. Andrus, No. C 77-0268 (D. Utah, Feb. 19, 1980) (Memorandum Opinion and Order). This opinion of the District Court of Utah was adopted by the District Court for the District of Wyoming in Stewart Capital Corp. v. Andrus, No. C79-123K (D. Wyo., Apr. 24, 1980) (Order and Memorandum Opinion). A contrary result affirming the retroactive application of Pack was reached by the District Court for the Southern District of Mississippi, Southern Division, in McDonald v. Andrus, No. S77-0333 (C).

In his answer to appellant's statement of reasons, Smith maintains that 43 CFR 3102.6-1 does not apply because Leland Capital acts only in a clerical and administrative capacity with no discretionary authority concerning selection of parcels. He contends that the contract provision whereby Leland agrees "to file client on parcels which have a potential of $10,000 or more" does not require Leland to select, but merely to file, a clerical and administrative task. We are not persuaded by this argument. Leland's agreement to file for parcels with a potential of $10,000 or more requires Leland to evaluate the worth of those parcels which BLM places in its monthly list. To evaluate the worth of a parcel, Leland might consider past bonuses for the parcel, past exploration or development in the area, or present and future plans for exploration. We note that offeror Smith bargained for Leland's "advisory services" in filing 144 DEC's. Assuming that Leland would pay the $10 filing fee for each of the 144 DEC's it filed, we are asked to believe that an offeror would pay $4,560 ($31.67 per DEC) for mere clerical and administrative services.

[2] Smith presents two additional arguments of a procedural nature. He argues first that the appeal of Alker should be dismissed because Alker failed to file a notice of appeal within the period of time set forth in 43 CFR 4.411. As set forth above, Alker filed a Supplemental Protest and Request for Reconsideration on March 17, 1980, after receiving BLM's decision of February 20, 1980. Alker's pleading ended with the following paragraph:

> The protestant requests that you consider this supplemental protest for the purpose of reconsidering and reversing the Decision of February 20, 1980. If this request is refused, and only in that event, then this pleading shall constitute the Notice of Appeal of the decision of February 20, 1980, to the Board of Land Appeals. This manner of conditionally giving Notice of Appeal is adopted only to avoid the running of the 30-day appeal period while this request is being considered.

Smith argues that inasmuch as BLM acknowledged on March 29, 1980, that Alker's supplemental protest was being considered a notice of appeal from the decision of February 20, 1980, Alker was not timely in filing his notice of appeal. There is little merit to this argument. Regulation 43 CFR 4.411 states in part as follows:

> (a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. The notice of appeal * * * must be transmitted in time to be filed in the office, where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing.

The pleading which BLM regards as a notice of appeal was received by the proper BLM office on March 17, 1980. Its receipt was well within the 30-day period required by 43 CFR 4.411. 2/ It is not clear at what point BLM decided to regard Alker's supplemental protest as a notice of appeal, whether before expiration of the 30-day period or after. It is clear, however, that within the 30-day regulatory period BLM had received and date stamped a document which it presently considers a notice of appeal. Although there exists no regulation specifically authorizing a BLM state office to reconsider its decision prior to an appeal, this Board has held that such reconsideration is permissible. John J. Sexton (On Reconsideration), 20 IBLA 187 (1975). See also Humble Oil & Refining Co., 65 I.D. 257 (1958); Richfield Oil Corp., A-27697 (October 23, 1958). It was not improper for Alker to seek reconsideration of the BLM state office decision. Further, we find no error here sufficient to hold Alker's appeal to be untimely.

Smith employs this same practice of pleading in the alternative in presenting his second argument of a procedural nature. Smith here asserts that the appeal should be dismissed pursuant to 43 CFR 4.402(b) for Alker's failure to timely serve his notice of appeal upon Smith. For these purposes, Smith argues that Alker's notice of appeal was filed with BLM on March 17, 1980. Alker did not serve a notice of appeal on Smith until April 12, 1980. 43 CFR 4.401(c)(3).

Regulation 43 CFR 4.413 reads in part as follows:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments, or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 4.401(c), not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 4.402.

Regardless of whether we dismiss Alker's appeal on the grounds proffered by Smith or not, the appeal by Alker is properly before the Board as a result of Alker's timely filing of a notice of appeal. This Board has jurisdiction over this appeal and may properly examine the file for whatever information it may provide. Dismissal of this appeal will not cause this Board to overlook the deficiency in Smith's DEC as set forth above. Nor will dismissal of Alker's appeal prejudice whatever rights Alker may have to lease U-44320 as the second-drawn offeror. Given this state of events, we see no need to act on Smith's request for dismissal.

2/ The case file does not reveal when BLM's decision of February 20, 1980, was received by Alker. In view of the date of the decision, his filing of March 17, 1980, had to be within the 30-day period following receipt of BLM's decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Joan B. Thompson
Administrative Judge